(3)

Supreme Court, U.S.
FILED
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No. 02-679

In the Supreme Court of the United States

DESERT PALACE, INC., DBA
CAESARS PALACE HOTEL & CASINO,
Petitioner,

v.

CATHARINA F. COSTA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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62 pp

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The following opinions, decisions, judgments and orders have been omitted in printing this Joint Appendix because they appear on the following pages in the Appendix to the Petition for Writ of Certiorari:

United States District Court -- Order, filed January 28, 1999 . . . . . Pet. App. 70a

Court of Appeals -- Original Opinion, filed October 2, 2001 . . . . . Pet. App. 54a

Court of Appeals -- En Banc Opinion, filed August 22, 2002 . . . . . Pet. App. 1a

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[1] The original jury instructions were misplaced by the District Court. The parties agreed by stipulation to supplement the record with another copy of the jury instructions. J.A. 2

RELEVANT DOCKET ENTRIES

CIVIL DOCKET FOR CASE #: CV-S-96-00009-DWH (RJJ)

1	1/4/96	COMPLAINT W/ JURY DEMAND. fj
69	6/3/98	SEPARATE JURY INSTRUCTIONS (with citations). fj cpy to DWH
71	6/8/98	OBJECTIONS to Ds proposed jury instructions obo P. (p) (AT) fj
80	6/17/98	JUDGMENT IN A CIVIL CASE (DWH) ORD in favor of p and against d. Cps dis (AT) fj
87	6/29/98	MOTION for judgment as matter of law; MOTION FOR NEW TRIAL OR REMITTITUR OBO D. (m) (AT) fj
93	1/27/99	ORDER (DWH) Ds. mtn (#87) for judgment as a matter of law is DENIED: Ds mtn (#87) for new trial DENIED on condition P accepted a reduction of compensatory damages to $100,000 within 30 days of service of this order. If p does not accept this reduction, Caesar's mtn (#87) for new trial will be granted on the issue of the amt of compensatory damages only. FUR ORD ps mtn for attnys fees/costs (#82) is GRANTED in amt of $51,972.38. FUR ORD mtn (#90) for review of clk's taxation of costs

		GRANTED and clk instructed to tax additional costs in amt of $3862.60. Cps dist. (At) fj EOD 1-28-99
97	2/17/99	JUDGMENT IN CIVIL CASE (DWH) ORD JUDGMENT IN FAVOR O P & against D. CPs dist. (AT) fj EOD 2-17-99
98	3/2/99	NOTICE of appeal obo D Desert Palace re #97. Appeal filing fees pd #30237. (m) (AT) fj
113	9/14/99	STIPULATION/ORDER (DWH) RE JURY INSTRUCTIONS FOR RECORD ON APPEAL. fj

USCA Docket Sheet for 99-15645

4/7/99	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N) : yes. setting schedule as follows: CADS is past due; CADS must be filed no later than 4/14/99; appellant's designation of RT is due 3/12/99; appellee's designation of RT is due 3/22/99; appellant shall order transcript by 4/1/99; court reporter shall file transcript in DC by 5/3/99,; certificate of record shall be filed by 5/10/99; [99-15645] (dg) [99-15645]

9/13/00	ARGUED AND SUBMITTED TO Alex KOZINSKI, Andrew J. KLEINFELD, William W. Schwarzer [99-15645] (ms) [99-15634]
9/27/00	FILED CERTIFIED RECORD ON APPEAL: 5 CLERK'S RECORDS, 5 REPORTER'S TRANSCRIPTS, AND 2 FOLDERS OF BULKY DOCUMENTS. (ORIGINAL) [99-15645] (sd) [99-15645]
12/29/00	FILED OPINION: VACATED in part; REVERSED in part; and REMANDED. (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Alex KOZINSKI; Andrew J. KLEINFELD; William W. Schwarzer, author.) FILED AND ENTERED JUDGMENT. [99-15645] (dg) [99-15645]
1/11/01	[4072052] Filed original and 50 copies Appellee Catharina F. Costa's petition for rehearing with suggestion for rehearing en banc 11 p.pages, served on 1/9/01 (PANEL AND ALL ACTIVE JUDGES) (sm) [99-15645]
10/2/01	OPINION FILED (Alex KOZINSKI; Andrew J. Kleinfeld; William W. Schwarzer,): denying petition for

	rehearing [4072052-1] VACATED in part; REVERSED in part; and REMANDED. [99-15645] (gar) [99-15645]
10/4/01	Filed Catharina F. Costa's motion to stay the mandate pending pet for writ of cert to Supreme Ct. [99-15645] served on 10/3/01 FEDEXED TO JUDGE KOZINSKI (presiding judge [4268786] (gar) [99-15645]
12/19/01	Filed order (Mary M. SCHROEDER,): Upon the vote of a majority of nonrecused regular active judges of this ct, it is ordered that this case be reheard by the en banc court pursuant to CR 35-3. The 3-judge panel opinion shall not be cited as precident by or to this ct or any dc of the 9th Cir, except to the extent adopted by the en banc ct. [4072052-1] [99-15645] (gar) [99-15645]
3/21/02	ARGUED AND SUBMITTED EN BANC TO: Mary M. SCHROEDER, Stephen R. REINHARDT, Alex KOZINSKI, Ferdinand F. FERNANDEZ, Andrew J. KLEINFELD, Barry G. SILVERMAN, Susan P. GRABER, M.M. McKEOWN, Raymond C.

	FISHER, Ronald M. GOULD, Richard A. PAEZ [99-15645] (dl) [99-15645]
8/2/02	OPINION FILED (Mary M. SCHROEDER, Stephen R. REINHARDT, Alex KOZINSKI, Ferdinand F. FERNANDEZ, Andrew J. KLEINFELD, Barry G. SILVERMAN, Susan P. GRABER, M. M. McKEOWN, Raymond C. FISHER, Ronald M. GOULD, Richard A. PAEZ,) : AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. M. M. McKEOWN is author dissent by Ronald M. GOULD, Alex KOZINSKI, Ferdinand F. FERNANDEZ and Andrew J. KLEINFELD. Each party to bear its own costs on appeal. [99-15645] (gar) [99-15645]
8/27/02	MANDATE ISSUED [99-15645] (hh) [99-15645]

Cross-Examination of Catherina F. Costa by Mr. Mark M. Ricciardi: [p. 233]...BY MR. RICCIARDI:

Q Now, you say Mr. Gerber physically attacked you, correct?

A I was attacked in the elevator and it was not mutual.

Q And you claim he started it?

A He came in after me. I was in the process of doing my job. He was supposed to be at lunch. He shouldn't have even been there interfering with my job.

Q So it's your testimony, then, that this was not a verbal altercation in the elevator?...

THE WITNESS: I was assaulted in the elevator.

What transpired after I was assaulted, you might call that a verbal altercation. I don't know what you – what you're meaning by this.

BY MR. RICCIARDI:

Q Now, Mr. Gerber claimed that you physically attacked him, didn't he?

[p. 234] A Yes, he did.

Q And he claimed that you started it.

A Then why did he come after me in the elevator?

I did not start it. He came after me. I was minding my own business. I had no idea what he was talking about.

Q But you claim he started it, he claimed you started it, there was -- there's no witnesses to this, this was in an elevator, correct?

A There was no witnesses in the elevator, no....

[p. 237]...Q And you thought you were treated more harshly in this elevator incident than Mr. Gerber because you were female?

A I knew I was treated more harshly because I was assaulted. I'm the one that had the bruise.

He came after me, I did not go after him. He came after me a second time upstairs after Karen said she would take care of him.

And the men, they fight and get their slap on the wrist. There are instances in the warehouse where the men have fought and there was no discipline, it was never put in their file.

Q So in this incident, it's you and Mr. Gerber, right?

A Yes.

Q In the elevator, and you and Mr. Gerber got a five-day suspension and you got a termination, correct?

A Yes.

Q And you thought that was unfair. You thought you were treated more harshly than Mr. Gerber because you're a woman.

That's the basis of your sex discrimination claim, isn't it?

A Not only am I a woman, but I was the one that was assaulted, and I doubt if I were one of the men he would have done that to me...

[p. 248]...BY MR. RICCIARDI:

Q Now, you said at one point Mr. Dudenake got some overtime, and you felt it was unfair for him to get it instead of you?

A I didn't exactly put it that way. I thought the whole situation was unfair.

Q Now, you said something about being told why he got the [p. 249] overtime. Were you quoting Mr. Bach or Mrs. Hallett on that?

A That was a question that was asked of Mr. Bach, and I think Karen originally made that, and she was -- the office is connected, and I think she was in his office when he answered us when that question was asked.

Q So this is Mr. Bach you're quoting when you're saying -

A He's the one that -- he's the one that verified the statement, yes.

Q And he said that Dudenake was getting the overtime because he had a family to support?

A That's what was said at the time.

Q He didn't say anything about Mr. Dudenake being a man in that conversation?

A I took it as such.

Q But he didn't say that?

A A man that has a family to support.

Q You took it that way, but he didn't say the word "man," did he?

A He didn't have to say the word "man" because people can say a lot of things. The inference was there...

[p. 260]...Q Now, at Caesar's there was never any joking around about the fact that you're a woman and all the rest of the Teamsters were men, was there?

A I had guys make reference and say things to me like, "You got more balls than the guys."

I was called a bitch, things like that. I don't know if that would be considered --

Q Well, there was never any joking around about the fact that you're a woman and they were all men?

A I think saying -- making a statement like I've got more [p. 261] balls than the guys is -- speaks for itself....

BY MR. RICCIARDI :

Q Go down to line thirteen. Did you find line thirteen? Have you found line thirteen yet, ma'am?

A Yes.

Q See the question where I asked you,

"QUESTION: No joking around, like, just the fact that you're a woman and they're all men?"

And your answer was, "To my face, no."

Do you see that? Did I read that correctly?

Did I read those words correctly?

A This is out of context because, in the paragraph before, you're talking about NBC and California and --

Q But this line of questions was every job you've had through Caesar's, wasn't it?

A I don't -- I don't know if it was. It's taken out of context. I --

Q Well, then, let me ask you a different question.

During the time you were at Caesar's, no manager or supervisor ever made a remark to you that included specific reference to you being a woman or a girl or female, isn't [p. 262] that correct?

A You don't necessarily have to make a remark to a person when the inference is there and the actions are there, and the actions were noticeable, that I felt -- I felt uncomfortable.

It made my life miserable. I was upset. I got headaches. The inference was there. I knew I was being treated differently because I was a woman.

Q Is that a long way of saying no, no one ever made such remarks to you, ma'am?

A I don't remember if they did....

Redirect of Jeffrey Graham by Mr. Robert N. Peccole: [p. 298]...Q And did you ever hear Karen Hallett make any remarks about Catharina Costa?

A Yes, sir.

Q And what were those remarks?

A On more than one occasion, she -- Karen had called me into [p. 299] her office and told me that she wanted to get rid of that bitch.

Q And did she give you any reason why?

A No, it was basically she did not like the way that Catharina did her job....

[p. 307]...Q And did she ever refer to Catharina Costa as not being a team player?

A That's what I just said, she consistently --

Q I'm sorry. I'm having a hard time --

A She consistently kept -- let me start over.

Karen Hallett constantly made the statement to me that Catharina Costa was not a team player....

Cross Examination of Donald Thomas by Mr. Mark J. Ricciardi: [p. 323]...Q Now, Ms. Costa and Ms. Hallett, they didn't like each other, did they?

A I would say no.

Q As far as you know, it was a personality conflict?

A I -- I don't know what -- I don't know what you would call it.

Q Well, Ms. Costa never said anything about not liking Ms. -- excuse me, Ms. Hallett never said anything in your presence about not liking Ms. Costa just because she was a [p. 324] woman, did she?

A No.

Q In fact, Ms. Hallett had other Teamsters that she either favored or didn't favor, right?

A Yeah.

Q You didn't see it was any basis -- that it was based on sex or someone being a female versus a male?

A No.

Q And when Mr. Peccole was asking you questions about was she treating Ms. Costa differently than the men, all of the other Teamsters were men, isn't that true?

A Right....

Direct Examination of Mark Dudenake by Mr. Robert N. Peccole: [p. 328]...Q Did you have some complaints about the way Ms. Hallett was assigning overtime?

A I had some complaints about overtime, yes. I don't know [p. 329] who was in charge of it.

Q Did you file grievances over that?

A Yes.

Q This was during the time you were working under Ms. Hallett, though?

A Correct....

Cross-Examination of Mark Dudenake by Mr. Mark J. Ricciardi: [p. 335]...Q At the time that you had made grievances concerning overtime, was there a procedure that was to be used with regard to who got what overtime?

A Yes, there was a schedule.

Q And she was not following that procedure?

A No.

Q And is that why you were grieving?

A Correct....

Cross-Examination of Ray Bell by Mr. Mark J. Ricciardi: [p. 340]...Q Now, you never observed Karen Hallett picking on Ms. Costa, did you?

A No.

Q And you never observed Ms. Hallett stalking Ms. Costa?

A No, I just heard about those incidences.

Q And Ms. Costa was very vocal about union contract issues with Ms. Hallett, wasn't she?

A Yes, she was the steward at the time....

Cross-Examination of Bobby Whitaker by Mr. Mark J. Ricciardi: [p. 348]...Q You didn't think overtime was being given out fairly by Ms. Hallett, did you?

A No, I did not.

Q That was because you, yourself, were also losing overtime; is that right?

A Yes, sir.

Q And in terms of contract issues that came up, Ms. Costa was a very vocal steward, wasn't she, in confronting management?

A Well, confronting management, she was very vocal about enforcing the contract....

Cross-Examination of Donald Cornaggia by Mr. Mark J. Ricciardi: [p. 357]...Q You had a problem with the way overtime was distributed at one point by Ms. Hallett, didn't you?

A Yes.

Q You felt it wasn't fair the way it was being done?

A That's correct....

Defendant's Motion for Judgment as a Matter of Law and Objection to Jury Instructions: [p. 458]...MR. RICCIARDI: Your Honor, I would like to [p. 459] make a motion for

judgment as a matter of law on all issues currently before the Court.

In particular, I don't think that there's been sufficient evidence raised to show a prima facie case of discrimination.

There have not been incidents of similarly-situated individuals treated differently. Furthermore, the hotel has come forward with legitimate nondiscriminatory reasons for the actions that were taken, and there's been no evidence sufficient to withstand this motion raised to create a jury issue of pretext.

THE COURT: All right. We're dealing now with mixed motive, we're not dealing with single motive, first of all.

And in the context of a mixed motive case, one looks at discrimination based on sex in the areas of compensation, terms, conditions, privileges, either by disparate treatment or by causing a disparate result or by hostile work environment.

This is apparently a disparate treatment case having to do with those matters about which the plaintiff has complained, the overtime request, the discipline, the conditions of her employment.

The elements of this mixed motive case are set forth in Price-Waterhouse. Plaintiff's burden is to show that sex [p. 460] played a motivating part in the decision.

I think she's produced evidence to satisfy her burden with respect to that.

Defendant's burden is that the decision would have been the same even if sex had played no role, and I think both sides have even thus far, if everybody stopped right now, proved a case for the jury.

So the motion is denied.

Now, let's go into jury instructions.

MR. PECCOLE: Your Honor, plaintiff has no objections to the instructions or the verdict form.

THE COURT: All right. May I hear from the defense?

MR. RICCIARDI: Yes, your Honor.

We have no objections to the Court's instructions 1 through 9. I believe this is not a mixed motive case, and under Price-Waterhouse, direct evidence of discrimination is required.

So I believe that the burden that has been placed on the defendant --

THE COURT: You mean direct as opposed to circumstantial?

MR. RICCIARDI: Yes, your Honor.

THE COURT: You can't infer discrimination from the conduct of the employers?

[p. 461] MR. RICCIARDI: You can infer discrimination, but that's the set up for a prima facie case. The cases that give the mixed motive --

THE COURT: All right. Okay. Go on. I just wanted to make sure I heard you correctly.

Now, you're objecting to --

MR. RICCIARDI: Number ten.

THE COURT: Oh, ten, sorry, okay.

MR. RICCIARDI: And I'll agree with the Court, that it is a reasonable statement of the mixed motive instruction so --

THE COURT: All right, good. And so what you would want, for example, would be to show the unlawful discrimination and then have the defendant show the legitimate nondiscriminatory reason and then have the plaintiff be required to show pretext.

MR. RICCIARDI: Yes, your Honor.

THE COURT: And that's the basis of your objection?

MR. RICCIARDI: Yes, your Honor.

THE COURT: All right. Please go on to your next objection.

MR. RICCIARDI: Number thirteen is the punitive damage instruction.

And I know this is discretionary with the Court [p. 462] because it's not a substantive issue, but it's a wording issue on line six.

I think the concept here that the Court is trying to convey is that to award punitive damages, you have to have a showing of intent higher than the level necessary to get compensatory damages, and I just think the word threshold is not a word that's in every day use with most jurors, and I don't think the word is necessary there.

I know it's minor, your Honor, but --

THE COURT: Do you have any thoughts on that, Mr. Peccole, one way or the other?

MR. PECCOLE: Your Honor, I'll abide by whatever the Court wants to do on that instruction. It meets my approval on this, I don't have any problem with any of that language.

THE COURT: I haven't any problem taking threshold out.

Well, we'll take that under advisement overnight. Let me just make a note of it and let you know in the morning whether I have so you'll know what you'll be getting.

Please go on.

MR. RICCIARDI: Number fourteen is a correct statement of the law, however, I think it's unnecessary and potentially confusing and could be misunderstood in this case.

[p. 463] There's going to be lots of evidence of supervisors or there has been lots of evidence of supervisors doing different things for different reasons, and to highlight this could send the message to the jury that if a supervisor makes either an unwise business decision or a mistake, even if it's not sexual discrimination, it could lead the jury to think that Caesar's would still be responsible to pay damages for that.

That's why I think this is unnecessary in this case and could be misunderstood and misleading to the jury.

THE COURT: Well, if that's the case, would you be satisfied if after "personnel" there were added "in matters like this," "in matters of this kind," in order to focus the statement upon the case at hand.

MR. RICCIARDI: That would be somewhat better, your Honor.

THE COURT: All right. Next please.

That's it, I guess.

MR. RICCIARDI: Well, I, just for the record, will make a -- I don't know, the verdict form itself, of course, that's based on the mixed motive instruction so my objection –

THE COURT: And your objection carries on through to the verdict form, of course.

MR. RICCIARDI: And then if I may just put on [p. 464] the record what I've proffered that you're not giving, is it sufficient that I've filed with the Court –

THE COURT: It's sufficient that you proffered it.

MR. RICCIARDI: I filed it with the Court?

THE COURT: Yes.

MR. RICCIARDI: All right. Thank you, your Honor....

[Title omitted in printing]

SEPARATE JURY INSTRUCTIONS
(With Citations)

Defendant, Desert Palace, Inc. dba Caesars Palace Hotel & Casino, hereby submits Separate Jury Instructions which are not agreed upon by the parties. NOTE: The attached instruction "Plaintiff's Burden of proof" has been accepted by both parties. The Jointly Submitted Jury Instructions filed today erroneously contained an improperly modified version of the instruction. A copy of Plaintiffs original draft of the instruction is also attached.

DATED this 3 day of June, 1998.

RICCIARDI & ASSOCIATES

By: /s/ _____
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INSTRUCTION NO. _____

PLAINTIFF'S BURDEN OF PROOF - DISPARATE TREATMENT CLAIM UNDER TITLE VII

To prevail on a claim of intentional discrimination, the plaintiff must prove by a preponderance of the evidence that the defendant had a reason or motive to discriminate against her in the matter before this court. The plaintiff must prove, either directly or indirectly, that there is evidence of intentional discrimination. Direct evidence would include oral or written statements showing a discriminatory motivation for the defendant's treatment of the plaintiff. Indirect or circumstantial evidence would include proof of a set of circumstances that would allow one to reasonably believe that gender was a motivating factor in the defendant's treatment of the plaintiff.

Model Jury Instructions - Employment Litigation Section of Litigation - American Bar Association, Section 1.02[1] (1994)

42 U.S.C. §2000e-2(m); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L. Ed. 2d 668 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1084, 67 L. Ed. 2d 207 (1981); Devit, Blackmar and Wolff, *Federal Jury Practice and Instructions* § 104.03 (1987 & Supp. 1993).

INSTRUCTION NO. _____

DEFENSES TO INDIRECT EVIDENCE OF DISCRIMINATION

In this case, the plaintiff must prove by a preponderance of the evidence that her sex was a motivating factor in the defendant's decision to discharge her. The plaintiffs sex was a motivating factor if you find that it played a role in the defendant's decision, even though other factors may have also played roles in that decision.

You must consider any legitimate, nondiscriminatory reason or explanation stated by the defendant for its decision. If you find that the defendant has stated a valid reason, then you must decide in favor of the defendant unless the plaintiff proves by a preponderance of the evidence that the stated reason was not the true reason but is only a pretext or excuse for discriminating against the plaintiff because of her sex.

The plaintiff can attempt to prove pretext directly by persuading you by a preponderance of the evidence that her sex was more likely the reason for the defendant's decision than the reason stated by the defendant.

The plaintiff can also attempt to prove that the defendant's stated reason for its decision to discharge is a pretext by persuading you that it is just not believable. However, it is not enough for the plaintiff simply to prove that the defendant's stated reason for its decision was not the true reason. The reason for this is that the plaintiff always must prove by a preponderance of the evidence that she was discharged because of her sex. Therefore, even if you decide

that the defendant did not truly rely on the stated reason for its decision to discharge, you cannot decide in favor of the plaintiff without further evidence that the defendant relied instead on the plaintiff's sex.

American Bar Association Model Jury Instructions, Employment Litigation §1.02(3)(a). 42 U.S.C. §2000e-2(m); McDonnell Douglas Corp. v. Green, 411 U. S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); Texas Department of Community Affairs v. Burdine, 450 U. S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); Price Waterhouse v. Hopkins, 490 U. S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989); International Brotherhood of Teamsters, 431 U. S. 324, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977); Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U. S. 252, 97 S. Ct. 1843, 52 L. Ed. 2d 396 (1977); Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979); Harpring v. Continental Oil Co., 628 F.2d 406 (5th Cir. 1980), *cert. denied,* 454 U. S. 819, 102 S. Ct. 100, 70 L. Ed. 2d 90 (1981); Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975); Wilkins v. Eaton Corp., 790 F.2d 515 (6th Cir. 1986); Galbraith v. Northern Telecom, Inc., 944 F.2d 275 (6th Cir. 1991), *cert. denied,* 112 S. Ct. 1497, 117 L. Ed. 2d 637 (1992); Estes v. Dick Smith Ford, Inc., 856 F.2d 1097 (8th Cir. 1988); Anderson v. Savage Laboratories, Inc., 675 F.2d 1221 (11th Cir. 1982); Clark v. Huntsville City Board of Education, 717 F.2d 525 (11th Cir. 1983).

INSTRUCTION NO. _____

LEGITIMATE NONDISCRIMINATORY REASON

A legitimate nondiscriminatory reason is any reason or explanation unrelated to the plaintiffs sex. In considering the legitimate nondiscriminatory reason stated by the defendant for its decision, you are not to second-guess that decision or to otherwise substitute your judgment for that of the defendant.

In this case, the ultimate burden of persuading the jury that the defendant intentionally discriminated against the plaintiff because of her sex remains at all times with the plaintiff. The defendant is therefore not required to prove that its decision was actually motivated by the stated legitimate nondiscriminatory reason.

American Bar Association Model Jury Instructions, Employment Litigation §1.02(3)(b). 42 U.S.C. §2000e-2(k)(1)(C)(2); Griggs v. Duke Power Co., 401 U.S. 424 (1971); Watson v. Fort Worth Bank & Trust, 487 U. S. 977, 108 S. Ct. 2777, 101 L. Ed. 2d 827 (1988); McDonnell Douglas Corp. v. Green, 411 U. S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973); Texas Department of Community Affairs v. Burdine, 450 U. S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); Galbraith v. Northern Telecom, Inc., 944 F.2d 275 (6th Cir. 1991), *cert. denied,* 112 S. Ct. 1497, 117 L. Ed. 2d 637 (1992); Thornbrough v. Columbus & Greenville Railway Co., 760 F. 2d 633 (5th Cir. 1985); Sherrod v. Sears, Roebuck & Co., 785 F.2d 1312 (5th Cir. 1986); Reeves v. General Foods Corp., 682 F.2d 515 (5th Cir. 1982); Elliott v. Group Medical & Surgical Service, 714

F.2d 556 (5th Cir. 1983), *cert. denied,* 467 U. S. 1215 (1984); Williams v. General Motors Corp., 656 F.2d 120 (5th Cir. 1981), *cert. denied,* 455 U. S. 943, 102 S. Ct. 1439, 71 L. Ed. 2d 655 (1982); Young v. City of Houston, 906 F.2d 177 (5th Cir. 1990); United States v. Town of Cicero, 785 F.2d 331 (7th Cir. 1986); Kephart v. Institute of Gas Technology, 630 F.2d 1217 (7th Cir. 1980), *cert. denied,* 450 U. S. 959 (1981).

[Title omitted in printing]

JURY INSTRUCTIONS

Members of the jury, now that you have heard all the evidence, it is my duty to instruct you on the law which applies to this case. A copy of these instructions will be available in the jury room for you to consult if you find it necessary.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally important. You must not read into these instructions or into anything the court may have said or done any suggestion as to what verdict you should return--that is a matter entirely up to you.

JURY INSTRUCTION NO. 1

In reaching your verdict, you may consider only the testimony and exhibits received into evidence. Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not

witnesses. What they have said in their opening statements, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

3. Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered. In addition some testimony and exhibits have been received only for a limited purpose; where I have given a limiting instruction, you must follow it.

4 Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at the trial.

JURY INSTRUCTION NO. 2

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what the witness personally saw or heard or did. Circumstantial evidence is proof of one or more facts from which you could find another fact. You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

JURY INSTRUCTION NO. 3

You may use notes taken during trial to assist your memory, Notes, however, should not be substituted for your memory, and you should not be overly influenced by the notes.

JURY INSTRUCTION NO. 4

The evidence from which you are to decide what the facts are consists of:

1. the sworn testimony of witnesses, on both direct and cross-examination, regardless of who called the witness;

2. the exhibits which have been received into evidence; and

3. any facts to which all the lawyers have agreed or stipulated.

JURY INSTRUCTION NO. 5

In deciding the facts in this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it.

In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;

2. the witness' memory;

3. the witness' manner while testifying;

4. the witness' interest in the outcome of the case and any bias or prejudice;

5. whether other evidence contradicted the witness' testimony;

6. the reasonableness of the witness' testimony in light of all the evidence; and

7. any other factors that bear on believability.

The weight of the evidence as to a fact does not necessarily depend on the number of witnesses who testify.

JURY INSTRUCTION NO. 6

When a party has the burden of proof on any claim or affirmative defense by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim or affirmative defense is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

JURY INSTRUCTION NO. 7

Section 2000e-2(a)(1) of Title 42 of the United States Code provides in part, that:

It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's...sex.

JURY INSTRUCTION NO. 8

The plaintiff has the burden of proving each of the following by a preponderance of the evidence:

1. Costa suffered adverse work conditions, and

2. Costa's gender was a motivating factor in any such work conditions imposed upon her. Gender refers to the quality of being male or female.

If you find that each of these things has been proved against a defendant, your verdict should be for the plaintiff and against the defendant. On the other hand, if any of these things has not been proved against a defendant, your verdict should be for the defendant.

JURY INSTRUCTION NO. 9

You have heard evidence that the defendant's treatment of the plaintiff was motivated by the plaintiff's sex and also by other lawful reasons. If you find that the plaintiff's sex was a motivating factor in the defendant's treatment of the plaintiff, the plaintiff is entitled to your verdict, even if you find that the defendant's conduct was also motivated by a lawful reason.

However, if you find that the defendant's treatment of the plaintiff was motivated by both gender and lawful reasons, you must decide whether the plaintiff is entitled to damages. The plaintiff is entitled to damages unless the defendant proves by a preponderance of the evidence that the defendant would have treated plaintiff similarly even if the plaintiff's gender had played no role in the employment decision.

I will provide the jury with a form so that it can report a special interrogatory on the jury's finding on this question.

JURY INSTRUCTION NO. 10

If you find that the defendant discriminated against plaintiff based on her sex, then you must determine the amount of money that is fair compensation for plaintiff's damages. You may award compensatory damages only for injuries that the plaintiff proves were caused by defendant's allegedly wrongful conduct. The damages that you award must be fair compensation, no more and no less. In calculating damages, you should not consider any back pay that the plaintiff lost.

You may award damages for any pain, suffering, or mental anguish that plaintiff experienced as a consequence of the defendant's treatment of plaintiff. No evidence of monetary value of such intangible things as pain and suffering has been, or need be, introduced into evidence. There is no exact standard for fixing the compensation to be awarded for these elements of damages. Any award you make should be fair in light of the evidence presented at trial.

In determining the amount of any damages that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence. You may not award damages based on sympathy, speculation, or guess work. On the other hand, the law does not require that the plaintiff prove the amount of her losses with mathematical precision, but only with as much definiteness and accuracy as circumstances permit.

JURY INSTRUCTION NO. 11

The plaintiff must make every reasonable effort to minimize or reduce her damages for loss of compensation by seeking employment. This is called mitigation of damages.

If you determine that the plaintiff is entitled to damages, you must reduce these damages by (1) what the plaintiff earned, and (2) what the plaintiff could have earned by reasonable effort during the period from her discharge until the date of trial.

You must decide whether the plaintiff was reasonable in not seeking or accepting a particular job. However, the plaintiff must accept employment that is "of a like nature." In determining whether employment is "of a like nature," you may consider:

(1) The type of work,

(2) The hours worked,

(3) The compensation,

(4) The job security,

(5) The working conditions, and

(6) The other conditions of employment.

The defendant must prove that the plaintiff failed to mitigate her damages for loss of compensation.

If you determine that the plaintiff did not make reasonable efforts to obtain another similar job, you must decide whether any damages resulted from her failure to do so. You must not compensate the plaintiff for any portion of her damages that resulted from her failure to make reasonable efforts to reduce her damages.

JURY INSTRUCTION NO. 12

If you find for plaintiff and if you award compensatory damages or nominal damages, you may, but are not required to, award punitive damages. The purposes of punitive damages are to punish a defendant and to deter a defendant and others from committing similar acts in the future.

Plaintiff has the burden of proving that punitive damages should be awarded, and the amount, by a preponderance of the evidence. You may award punitive damages only if you find that Plaintiff has made a showing beyond the threshold level of intent required for compensatory damages. An award of punitive damages is proper where defendant's illegal acts were willful and egregious, or displayed reckless disregard to plaintiff's rights. Conduct is in reckless disregard of plaintiff's rights if, under the circumstances, it reflects complete indifference to the safety and rights of others.

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient too their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering punitive damages, you may consider the degree of reprehensibility of the defendant's conduct and the

relationship of any award of punitive damages to any actual harm inflicted on the plaintiff.

JURY INSTRUCTION NO. 13

You may not award plaintiff compensatory or punitive damages for any allegedly wrongful conduct by defendant which took place before November 21, 1991.

JURY INSTRUCTION NO. 14

A corporation such as Caesars Palace acts through its management and is responsible for the decisions and actions of its management and supervisory personnel in matters of this kind.

JURY INSTRUCTION NO. 15

When you retire, you should elect one member of the jury as your foreperson. That person will preside over the deliberations and speak for you here in court.

You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous.

Each of you must decide the case for yourself, but you should do so only after your have considered all of the evidence, discussed it fully and with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion if the discussion persuades you that you should. Do not come to a decision simply because other jurors think it is right.

If is important that you attempt to reach a unanimous verdict but, of course, only if each of you can do so after having made your own conscientious decision. Do not change an honest belief about the weight and effect of the evidence simply to reach a verdict.

JURY INSTRUCTION NO. 16

If it becomes necessary, during your deliberations to communicate with me, you may send a note through the marshal, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court. If you send out a question, I will consult with the parties before answering it, which may take some time. You may continue your deliberations while waiting for the answer to any question. Remember that you are not to tell anyone--including me--how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged. Do not disclose any vote count in any note to the court.

JURY INSTRUCTION NO. 17

After you have reached unanimous agreement on a verdict, your foreperson will fill in, date, and sign the verdict

form or forms and advise the court that you have reached a verdict.

GIVEN IN OPEN COURT this _____ day of June, 1998.

_____
UNITED STATES DISTRICT JUDGE

[Title omitted in printing]

VERDICT FORM
[Filed June 15, 1998]

We, the jury, duly impaneled and sworn upon our oaths, submit the following verdict:

1. Do you find that Defendant Caesars Palace violated the Civil Rights Act in that Plaintiff's gender (sex) was a motivating factor in any adverse condition of plaintiff's employment?
Yes X No. __

NOTE: If you answered No to Question 1, your deliberations are complete and you need not answer any further questions. If you answered yes, please answer the following special interrogatory:

2. Do you find that the defendant's wrongful treatment of plaintiff was motivated both by gender and a lawful reason(s)?
Yes X No. __

If your answer was "Yes", answer the next question. If your answer was "No", proceed to question No. 4.

3. If so, has the defendant proved by a preponderance of the evidence that the defendant would have made the same decisions if the plaintiff's gender had played no role in the employment decision?
Yes __ No. X

If you answered "Yes", stop and sign and date this form. If you answered "No", please continue.

4. What amount of financial loss do you find should be awarded to Plaintiff?
$ 64,377.74.

5. What amount of damages do you find should be awarded to Plaintiff for emotional pain, suffering, inconvenience, mental anguish and loss of enjoyment of life?
$ 200,000.00.

6. Was Defendant's violation willful and egregious or committed with reckless disregard to plaintiff's rights?
Yes X No. __

NOTE: If you answered No to Question 6, your deliberations are complete and you need not answer any further questions.

7. If you answered Yes to Question 6, what amount of damages do you find should be awarded to Plaintiff for punitive damages? $ 100,000.00.

/s/ _____
JURY FOREPERSON

6-15-98
Date

[Title omitted in printing]

MOTION FOR JUDGMENT AS A MATTER OF LAW AND MOTION FOR A NEW TRIAL OR REMITTITUR

[Filed June 29, 1998]

Defendant, Desert Palace, Inc. dba Caesars Palace Hotel & Casino ("Caesars"), hereby files its Motion for Judgment as a Matter of Law pursuant to Rule 50(b) and in the alternative Motion for a New Trial or remittitur pursuant to Rule 59.

This Motion is based upon the Memorandum of Points and Authorities filed herewith, the papers and pleadings on file herein, any oral argument that may be presented to the Court and the following attached exhibits:*

1. Costa's doctors bills, Plaintiff's Trial Exhibits 60, 61 and 62.

2. Costa's NERC Charges, Plaintiffs Trial Exhibits 1 and 3.

3. Dr. Hoffman's Notes of 8/25/93, Plaintiff's Trial Exhibit 65.

I.

INTRODUCTION

After three days of jury trial and several hours of deliberation, the jury reached a verdict on June 15, 1998. The jury awarded Costa $64,377.74 in back wages, $200,000.00

in compensatory damages and $100,000.00 in punitive damages. On June 19, 1998, the Court entered an Amended Judgment in favor of Plaintiff, Catharina F. Costa ("Costa") and against Caesars.

As to the issue of Costa's termination, Caesars is entitled to judgment as a matter of law pursuant to Rule 50(b) because the evidence, considered as a whole and viewed in light most favorable to Costa reasonably can support only a verdict for Caesars. Costa's termination of employment was a discrete issue in the case and there is no substantial evidence supporting a verdict in favor of Costa on that issue. The lack of substantial evidence requires the same result whether or not the case is analyzed on a traditional disparate treatment theory or on the mixed motive theory on which the jury was instructed.[1]

There is also a lack of substantial evidence to support the punitive damage award to Costa. Specifically, there is no substantial evidence of the requisite egregious conduct necessary to support an award of punitive damages.

Whether or not the Court grants the motion for judgment as a matter of law on the termination, Caesars is entitled to a new trial because the compensatory damage award was excessive. Costa failed to present the minimum evidence necessary under the statute, the EEOC guidelines

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[1] Caesars duly objected to the mixed motive jury instruction at trial and by this argument does not waive that objection.

and the case law. Caesars is entitled to a new trial or remittitur.

II.

CAESARS IS ENTITLED TO JUDGMENT AS A MATTER OF LAW

Rule 50(a)(1) states in pertinent part:

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

A judgment as a matter of law need not be rendered on all issues in the case and the court may simply render judgment on certain of the issues. Rule 50(a)(1), NGO v. Reno-Hilton Resort Corporation, 140 F.3d 1299, 1304 (9th Cir. 1998), (judgment as a matter of law granted solely on punitive damages issue).

A judgment as a matter of law is appropriate where there is a lack of substantial evidence supporting a verdict in favor of the non-moving party. Gillette v. Delmore, 979 F.2d

1342, 1346 (9th Cir. 1992), *cert. denied* 510 U.S. 932, 114 S. Ct. 345 (1993).

A. Caesars is Entitled to Judgment As a Matter of Law as to The Issue of Whether Caesars Intentionally Discriminated Against Costa in Her Termination

In order to establish a *prima facie* case of discrimination, Costa must introduce evidence that gives rise to an inference of unlawful discrimination. Bradley v. Harcourt Brace and Co., 104 F.3d 267, 270 (9th Cir. 1996).

Costa has failed to submit evidence supporting the *prima facie* case of employment discrimination because she has failed to show the necessary nexus between any alleged gender animus and the resulting decision to terminate her employment. See Wilson v. Stroh Companies, Inc., 952 F.2d 942, 945 (6th Cir. 1992).

Costa bears the initial burden of establishing a *prima facie* case of discrimination. Cordova v. Harrah's Reno Hotel-Casino, 707 F. Supp. 443, 446 (D. Nev. 1988) (citing McDonnell Douglas Corp v. Green, 411 U.S. 792, 802 (1973)). Even if Costa can establish a *prima facie* case, Caesars can rebut her claims by demonstrating that a legitimate, nondiscriminatory reason existed for her termination. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). Once Caesars rebuts the *prima facie* case, judgment in favor of Caesars is required unless Costa produces "specific, substantial evidence of pretext." Bradley, 104 F.2d at 270.

At trial, there was absolutely no dispute as to the following facts:

A. There were no witnesses to the incident in the elevator between Ms. Costa and Mr. Gerber.

B. Ms. Costa claimed that Mr. Gerber made physical contact with her.

C. Mr. Gerber claimed that Ms. Costa made physical contact with him.

D. At the time of the incident in the elevator, Mr. Gerber who had been employed for approximately 25 years, had no live suspensions whatsoever in his file, no discipline for any similar infractions regarding getting along with other employees; and in fact, had only minor counselings for parking matters and violation of break schedules.

E. At the time of the incident in the elevator, Ms. Costa had a history of written discipline for failure to get along with other employees. In particular, she had a live suspension that was issued on February 1, 1992. The suspension was for engaging in a verbal confrontation with co-worker, resulting in the use of profane and vulgar language - improper use of a pallet jack, Costa attempted to run into another employee. (Defendant's Exhibit D-14 at trial). The jury was not entitled to disregard this suspension because Costa did not file a timely charge of discrimination regarding the suspension with the Nevada Equal Rights Commission. Costa was required to file a charge of discrimination within 300 days of the alleged discriminatory action. 42 U.S.C.

§2000e-5(e)(1). Costa filed her first charge of discrimination on May 13, 1994, which is over 400 days too late to contest the suspension of February 1, 1992.

F. Ms. Costa's own union through representative Mike Riley, testified without contradiction that where there is an altercation between two employees, it is appropriate to look at the disciplinary history on each employee and it may be appropriate to give different levels of discipline to each employee. (This uncontroverted fact is also in accordance with the law. Stotts v. Memphis Fire Department, 858 F.2d 289, 299 (6th Cir. 1988) (In a case involving allegedly disparate discipline or allegedly discriminatory discharge, an employee's prior discipline record is the major, if not the most important factor)).

Costa raised no issue of pretext to overcome Caesars legitimate business decision to terminate her employment. The evidence was uncontroverted at trial that Assistant Warehouse Manager, Karen Hallett had taken actions which inflamed both male teamsters, as well as Ms. Costa. There was no evidence produced whatsoever to show that Ms. Hallett relied on any invalid or discriminatory prior discipline which would tend to prove that Caesars' proffered reasons for terminating Costa were pretextual. The mere fact that Hallett and Costa did not get along does not create evidence of pretext. Grimes v. Texas Department of Mental Health and Mental Retardation, 102 F.3d 137, 143 (5th Cir. 1996) (Evidence of mere dislike is not enough to prove pretext under Title VII).

Thus, Caesars is entitled to judgment as a matter of law with regard to the issue of Costa's termination and the

Court should set aside that portion of the jury' s verdict in the amount of $64,377.74 representing back wages.

B. Caesars is Entitled To Judgment As a Matter of Law As to the Issue of Punitive Damages

The Ninth Circuit has recently clarified the law regarding punitive damages under Title VII. An Asian-American female cocktail waitress was denied a leave of absence when she had complications with her pregnancy. A similarly situated white cocktail waitress was given two to three weeks off for her honeymoon. The jury concluded that the Reno-Hilton committed intentional discrimination based on national origin. However, the Honorable Howard T. McKibben granted the Reno-Hilton judgment as a matter of law on the plaintiffs punitive damage claim and the Ninth Circuit affirmed. Ngo v. Reno-Hilton Resort Corporation, 140 F.3d 1299, 1304 (9th Cir. 1998).

The Ninth Circuit explained that under Title VII, a plaintiff seeking punitive damages is required to make a showing beyond the threshold level of intent required for compensatory liability. The court held:

> Thus, to be entitled to an award of punitive damages, the plaintiff must demonstrate that the defendant "almost certainly knew that what he was doing was wrongful and subject to punishment."

Id. at 1304 (quoting from Soderbeck v. Burnett County, 752 F.2d 285, 291 (7th Cir. 1985), *cert.denied* 471 U.S. 1117, 105 S. Ct. 2360(1985)).

The record is devoid of any evidence in this case that Caesars' management maliciously intended to discriminate against Costa and knew that doing so would be in reckless disregard of her federally protected rights. Glaringly absent from this trial (and found in cases where punitive damages have been affirmed), is direct evidence of hostility or animosity based upon gender.

Costa admitted at trial that no supervisor or manager ever remarked about her gender, joked about it or in any other way spoke about it. While friction between Costa and Assistant Warehouse Manager Karen Hallett, may have been related to personality issues or to the fact that Costa vigorously asserted her rights as a union steward, there was no evidence whatsoever of any gender based hostility by Caesars.

The uncontroverted evidence at trial was to the contrary. The one and only time that Costa reported concerns about not being treated the same as her fellow teamsters, Rich Stewart immediately referred her to Caesars EEO Officer Annelle Lerner. Ms. Lerner investigated the issues, met with Ms. Costa and specifically asked Ms. Costa for names of similarly situated males who she felt were being treated differently. Despite the fact that Costa did not come forward with any names, Lerner and Stewart looked into the matter and determined that there was no basis for the claim of sex discrimination. Nevertheless, Lerner advised Costa to come

back with any additional complaints or issues and they would be further investigated. Costa never returned to Annelle Lerner with further complaints.

At the highest levels of the company, when a legitimate problem or complaint was brought forward by Costa, it was resolved in her favor. When Costa received a improper suspension on an attendance issue, Vice President of Human Resources Teri Dodd promptly voided it.

Other circuits have agreed that even where a jury finds intentional discrimination, it is not always appropriate for a jury to award punitive damages: Turic v. Holland Hospitality, Inc., 85 F.3d 1211, 1216 (6th Cir. 1996) (although the actions of the defendant's employees were duplicitous and disclosed a lack of empathy, they did not rise to the level to support a punitive damages award); Karcher v. Emerson Electric Company, 94 F.3d 502 (8th Cir. 1996) *cert. denied* __ U.S. __ 117 S. Ct. 1692 (1977); (plaintiff's evidence that her employer required qualifications for particular jobs which excluded her from access to those jobs did not support a finding that the defendant acted with malice or deliberate indifference); Kolstad v. American Dental Association, 139 F.2d 958, 969-970 (DC Cir. 1998) (intentional discrimination in promotion, sexually offensive jokes at staff meetings, derogatory terms used to refer to prominent professional women - held not egregious conduct sufficient to form an adequate basis for punitive damages); Lindale v. Tokheim Corp., 1998 WL 272763 *6 (7th Cir. May 29, 1998) (punitive damages may not be awarded in a garden variety disparate treatment case with no circumstances of aggravation such as

the involvement of higher management or a pattern of flouting the law).

Thus, the Court should grant Caesars' Motion for Judgment as a Matter of Law and set aside the $100,000.00 in punitive damages awarded by the jury.

III.

CAESARS IS ENTITLED TO A NEW TRIAL OR REMITTITUR BECAUSE THE VERDICT ON COMPENSATORY DAMAGES WAS EXCESSIVE

Where a court, after viewing the evidence concerning damages in a light most favorable to the prevailing party determines that the damages award is excessive, it must either grant defendant's motion for a new trial or deny the motion conditional upon the prevailing party accepting a remittitur. Fenner v. Dependable Trucking Company, Inc., 716 F.2d 598, 603 (9th Cir. 1983). The court may also order a new trial where the verdict is against the manifest weight of the evidence. Kern v. Levolor Lorentzen, 899 F.2d 772, 778 (9th Cir. 1990).

A. Title VII Requires Specific Types of Evidence to Support a Compensatory Damage Award

Prior to the Civil Rights Act of 1991, plaintiffs in Title VII discrimination cases could claim only back wage and certain out-of-pocket damages. After November 21, 1991, Title VII claimants could also claim compensatory damages.

42 U.S.C. § 1981a; Landgraf v. U.S.I. Film Products, 511 U.S. 244, 114 S. Ct. 1483, 1508 (1994).

The EEOC, as the primary enforcement mechanism against discrimination under Title VII, interpreted the 1991 Amendments allowing compensatory damages under Title VII and issued EEOC Policy Guidance No. 915.002 § II(A)(2) (July 14, 1992). The Commission's position statement noted that "[c]ases awarding compensatory and punitive damages under other civil rights statutes will be used as guidance in analyzing the availability of damages under § 1981a. Section 1981 cases are particularly useful because Congress treated the § 198la damage provisions as an amendment to § 1981." Id. at 10 n. 13. The Commission then explained its position on the availability of damages for emotional harm under § 1981 a as follows:

> Nonpecuniary losses for emotional harm are more difficult to prove than pecuniary losses. Emotional harm will not be presumed simply because the complaining party is a victim of discrimination. The existence, nature, and severity of emotional harm must be proved. Emotional harm may manifest itself, for example as sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self esteem, excessive fatigue, or a nervous breakdown. Physical manifestations of emotional harm may consist of ulcers, gastrointestinal disorders, hair loss, or headaches... The Commission will typically require medical evidence of

> emotional harm to seek damages for such harm in conciliation negotiations .... There should be corroborating testimony by the complaining party's supervisor, family, friends or anyone else with knowledge of the emotional harm.

Id. at 10-12 (footnotes omitted) (emphasis added).

B. Costa Failed to Provide Corroborating Evidence of Emotional Harm and Medical Proof of Emotional Harm

Costa provided only two scant pieces of evidence relating to emotional harm. She testified that she felt terrible about her treatment at Caesars and could not bear to go to work. She then presented medical bills for three visits to a family practitioner for treatment for headaches. See, Exhibit 1, attached. (The Court should note that it is undisputed that Costa had a history of migraine headaches dating back to 1986, a year before she joined Caesars, see Section III, C below).

Costa presented no corroborating evidence by her family, friends or anyone else with knowledge of her emotional harm. Furthermore, Costa presented no evidence whatsoever of having sought psychological or psychiatric examination, treatment or counseling. Costa put on no evidence whatsoever of any permanent or continuing emotional or psychological problems; and on the contrary, she stated that she felt great when she left Caesars and has not had another headache since. Costa is fully able to work as a teamster, and in the event there were full-time work as a

warehouse person available, she would do it. In fact, Costa is working as a teamster in the convention industry on a casual basis right now. The length of time that Costa allegedly was subjected to treatment causing emotional harm is also very short. In both of her charges of discrimination filed with the Nevada Equal Rights Commission, Costa set forth, under oath, that the sexual discrimination against her began in August of 1993. See, Exhibit 2, attached. She left Caesars about one year later, in August of 1994. Based upon the scant evidence of emotional harm presented by Costa at trial, $200,000.00 is far in excess of any amount she might reasonably be entitled to. Where a verdict is grossly excessive, it cannot be upheld. Hughes v. Electronic Data Systems, 976 F. Supp. 1303, 1308 (D. Az. 1997) (held compensatory damage verdict of $200,000.00 is grossly excessive).

C. The $200,000.00 Verdict is Out of Line With Other Reported Verdicts

Caesars has surveyed the compensatory damage awards under Title VII reported in the Ninth Circuit from the date the Civil Rights Act of 1991 became effective to the current date.

The awards ranged from a low of $10,000.00, Odima v. Weston Tucson Hotel, 53 F.3d 1484, 1498 (9th Cir. 1995) to a high of $285,000.00, Simpson v. Lucky Stores, Inc., 1993 WL 414668 at * 1 (9th Cir. October 6, 1993).

The Simpson award has not been attacked at the trial court level or appealed in any reported case, and there is no

language in the court's order adopting the verdict which indicates what evidence the jury relied on to make its damage award. Similarly, where a jury awarded a plaintiff $195,000.00 in compensatory damages, there is no discussion in reported cases of what psychiatric evidence there may have been at trial, however, the court specifically observed that the plaintiff had taken a three month leave of absence from work based upon stress. Mockler v. Multnomah County, 140 F.3d 808, 810, 812 (9th Cir. 1998).

However, in each and every other reported case where a large damage award has been upheld, the award was supported by psychiatric testimony. Barfield v. Chevron. U.S. Inc., 1997 WL 9888 at *31 (N.D. Ca. January 2, 1997), ($192,000.00 for one plaintiff and $176,000.00 for another plaintiff, both of which were supported by corroborated psychiatric testimony and records).

Even much smaller compensatory damage awards have been supported by psychiatric testimony. Bartlett v. U.S., 835 F. Supp. 1246, 1265 (E. D. Wash. 1993) ($25,000.00 - supported by psychiatric testimony); Meadows v. Guptill, 856 F. Supp. 1362, 1370-71 (D. Az. 1993) ($50,000.00 - involved sexual harassment and offensive touching - supported by psychiatric testimony).

Costa testified at trial that she feels good and never had another headache after the day she left Caesars. In a similar case, the court awarded compensatory damages in the amount of $5,000.00 where there was no permanent or lasting psychological damage. Johnson v. Good Year Tire and

Rubber Company, 790 F. Supp. 1516, 1529-30 (E. D. Wash. 1992).

The legislative history of the Civil Rights Act of 1991 shows that Congress sought to unify the law for employment discrimination cases. Therefore, it is useful to consider decisions rendered under the other federal civil rights statutes where compensatory damages have been awarded. Patterson v. PHP Health Care Corporation, 90 F.3d 927, 940 (5th Cir. 1996) *cert. denied* __ U.S. __, 117 S.Ct. 767 (1997).

Although the Ninth Circuit has affirmed jury awards as high as $300,000.00 in Section 1981 or 1983 cases, the awards generally are supported by psychiatric testimony or other medical evidence of psychiatric damage. Brady v. Gebbie, 859 F.2d 1543, 1557-58 (9th Cir. 1988) *cert. denied* 489 U.S. 1100, 109 S. Ct. 1577 (1989) ($300,000.00 found not excessive where there was ample testimony by plaintiff's psychiatrist to show emotional distress and psychological damage and permanent psychological damage that would require treatment for several years); Dias v. Sky Chefs, Inc., 919 F.2d 1370, 1373, 1376 (9th Cir. 1990) vacated on other grounds, 501 U.S. 1201, 111 S. Ct. 2791 (1991) (under Oregon state sex discrimination law - $100,000.00 in general damages - plaintiff had ongoing and regular treatment by a psychologist and after discharge became depressed, suffered eating and sleeping disorders and had psychological difficulty returning to the work force).

In a case under the Arizona Civil Rights Act, the court set aside a compensatory damage award of $200,000.00

because it was excessive. The plaintiff had no psychological damage and the court observed the following:

> Hughes is fully capable and functioning as he did before his termination; he suffers no permanent disability as a result of his termination. In fact, he has a part-time position at a school for the deaf which he finds enjoyable and rewarding. He is capable of performing the duties of that position if it was available full-time.

Hughes v. Electronic Data Systems, 976 F. Supp. 1303, 1308 (D. Az. 1997).

Similarly in the case at bar, Costa testified that she never had another headache after leaving Caesars, and she is now fully capable of working as a warehouse person; and is in fact, working in a teamster occupation in the convention industry.

In another case under Section 1983, a jury awarded $60,000.00 in general compensatory damages for emotional distress suffered by a fire fighter who was terminated. The district court found that $60,000.00 was an excessive award for emotional distress and offered the plaintiff the choice of a new trial or a remittitur reducing the damages to $30,000.00. Gillette v. Delmore, 979 F.2d 1342, 1345-46 (9th Cir. 1992) *cert. denied,* 510 U.S. 932, 114 S. Ct. 345 (1993).

One other large compensatory damage award under Section 1983 which was affirmed by the court specifically

stated that even though there may not have been substantial evidence of sex discrimination to support the verdict, there was substantial evidence of a due process violation which did support the verdict. Roberts v. College of the Desert, 870 F.2d 1411, 1417 (9th Cir. 1989) ($200,000.00 compensatory damages). In the case at bar, there were no constitutional claims and the entire case rested on a claim of sexual discrimination.

Courts in other circuits have grappled with excessive damage awards and have used a similar analysis to that used in the Ninth Circuit. A plaintiff in a racial and sexual discrimination law suit sought $250,000.00 in compensatory damages. The court did its own independent survey of reported compensatory damages awards in employment cases and found that the plaintiff was entitled to $100,000.00 in light of the fact that he had submitted psychiatric evidence from his doctor regarding his psychological and emotional problems. Shepard v. American Broadcasting Companies, 862 F. Supp. 486, 496 n.20, 497-98 (D. C. 1994) vacated on other grounds 62 F.3d 1469 (D.C. Cir. 1995).

An award of $40,000.00 for emotional distress to a prevailing plaintiff in a discrimination case was vacated by the United States Court of Appeals for the Fifth Circuit. Patterson v. PHP Health Care Corporation, 90 F.3d 927, 940 (5th Cir. 1996), *cert. denied* __ U.S. __, 117 S. Ct 767 (1997). The plaintiff testified that he felt "frustrated" and "real bad" for being judged by the color of his skin. He explained that the working environment was "unbearable" and was "tearing my self esteem down." He also stated that it made him "hurt" and made him "angry" and "paranoid" to

know that his supervisor referred to him as a "porch monkey" or a "nigger" and generally thought that he was inferior to white employees. The court vacated the $40,000.00 emotional distress award despite the fact that the district court could infer that being referred to as a "porch monkey" and a "nigger" would cause one emotional distress. However, the court held that since the plaintiff had not presented evidence as to any specific manifestation of harm listed by the EEOC policy statement and presented no corroborating testimony nor any expert medical or psychological evidence of damages, the award of $40,000.00 was excessive and not supported by the evidence. Id. at 939.

Similarly in the case at bar, Costa testified that she felt "terrible" whenever she had to go to work and that she dreaded going to work. She alleged that she felt she was being treated differently than the "guys." However, she presented no corroborating testimony whatsoever as to her emotional distress and sought no psychological or psychiatric counseling whatsoever. She visited her family doctor (not a psychiatrist or psychologist) on three occasions for headaches. However, the uncontroverted medical evidence is that she had a history of migraine headaches as early as 1986, which was at least one year before she even started working at Caesars. See, Exhibit 3 (Dr. Hoffman's notes of 8/25/93 - "Hx of migraine 1986"), attached.

IV.

CONCLUSION

Caesars requests that the Court grant judgment as a matter of law as to the issue of Costa's termination and as to the issue of punitive damages. In the event the Court does so, a new trial on the issue of compensatory damages would be warranted.

Whether or not the Court grants the Motion for Judgment as a Matter of Law, the compensatory damage award is clearly excessive, and the Court should order a new trial. As an alternative, the Court could order Plaintiff to choose between a lower amount on remittitur or a new trial.

DATED this 29th day of June, 1998.

RICCIARDI & PAUSTIAN

By: /s/ _____

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* Attached exhibits omitted in printing.